MAR 3 1 1995

No. 94-1291

In the Supreme Court of the United States

OCTOBER TERM, 1994

DALE LYNN RYAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court committed plain error in instructing the jury on the interstate commerce element of the federal arson statute, 18 U.S.C. 844(i).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Mandeville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948)	8
Russell v. *United States*, 471 U.S. 858 (1985)	6, 8, 9, 11
Summit Health, Ltd. v. *Pinhas*, 500 U.S. 322 (1991)	8
United States v. *Barton*, 647 F.2d 224 (2d Cir.), cert. denied, 454 U.S. 857 (1981)	11
United States v. *Medeiros*, 897 F.2d 13 (1st Cir. 1990)	8
United States v. *Mennuti*, 639 F.2d 107 (2d Cir. 1981)	10
United States v. *Monholland*, 607 F.2d 1311 (10th Cir. 1979)	10, 11, 12
United States v. *Olano*, 113 S. Ct. 1770 (1993)	12
United States v. *Ramey*, 24 F.3d 602 (4th Cir. 1994), petition for cert. pending, No. 94-5755	6, 7, 11
United States v. *Shively*, 927 F.2d 804 (5th Cir.), cert. denied, 501 U.S. 1209 (1991)	6
United States v. *Stillwell*, 900 F.2d 1104 (7th Cir.), cert. denied, 498 U.S. 838 (1990)	6, 7, 11
United States v. *Turner*, 995 F.2d 1357 (6th Cir.), cert. denied, 114 S. Ct. 282 (1993)	8
United States v. *Young*, 470 U.S. 1 (1985)	12

Constitution and statutes:

U.S. Const. Art. I, § 8, Cl. 3 (Commerce Clause)	8, 10, 13
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962(a)	13

Statutes--Continued: Page

18 U.S.C. 844(i) 2, 3, 5, 6, 7, 8, 9, 10, 11, 12
18 U.S.C. 922(q) (Supp. V 1993) 13

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1291

DALE LYNN RYAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-17a) is reported at 41 F.3d 361. The opinion of the panel (Pet. App. 19a-50a) is reported at 9 F.3d 660.

JURISDICTION

The judgment of the en banc court of appeals was entered on October 31, 1994. The petition for a writ of certiorari was filed on January 30, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Iowa, petitioner was convicted of arson, in violation of 18 U.S.C. 844(i). He was sentenced to 328 months' imprisonment. A panel of the court of appeals affirmed, with one judge dissenting in part. Pet. App. 19a-50a. The court granted rehearing en banc, *id.* at 18a, and affirmed the conviction, with five judges dissenting in part, *id.* at 1a-17a.

1. In January 1989, petitioner began managing Ryan Fun and Fitness Center, a West Burlington, Iowa, business. The building was owned by petitioner's father, a Kansas resident, and leased by him to a Kansas corporation. On December 6, 1989, petitioner's father ordered the business closed because it had been unsuccessful. Petitioner and his father then began efforts to sell the business. Petitioner took a photographic inventory of the interior and had a real estate agent inspect the property for purposes of conducting a market value analysis. On December 26, 1989, petitioner removed his personal property from the building in anticipation of a quick sale. Six days later, a fire engulfed the Fitness Center. Two volunteer fire fighters died fighting the blaze. Pet. App. 2a, 29a.

The fire marshal's investigation revealed that petitioner had the only key to the building at the time of the fire, that there were no signs of forcible entry, that the circuit breaker for the fire alarm panel had been turned off, and that the battery backup system had been disconnected. Based on an examination of debris and burn patterns, the marshal concluded that the fire was caused by arson. He also concluded that

flammable liquids had been used and that there were at least six separate areas of fire origin. Three days before the fire, a police officer had observed several containers, including floor solvents, motor oil, and linseed oil, in petitioner's car. Pet. App. 21a, 22a.

2. Section 844(i) makes arson of "any building" a crime when the building is "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. 844(i). With respect to the statute's interstate commerce requirement, the district court instructed the jury as follows:

> "Interstate commerce" means trade, or business, or travel between the states. "Used in an activity affecting interstate commerce" means to affect in some way trade, or business, or travel between the states.
>
> If you find from the evidence beyond a reasonable doubt that, on or about January 1, 1990, the Ryan Fun and Fitness Center building was owned by Ronald D. Ryan, a resident of Kansas, and leased by him to Ryan Air Services, Inc., a Kansas Corporation, then the required affect [sic] on interstate commerce has been proved; or if you find from the evidence beyond a reasonable doubt that on January 1, 1990, the Ryan Fun and Fitness Center building was supplied with natural gas used to heat the building, and such natural gas was supplied from outside of the state of Iowa, then the required affect [sic] on interstate commerce has been proved. If you do not so find, then the required affect [sic] on interstate commerce has not been proved and you must find the defendant not guilty.

Pet. App. 3a. Petitioner did not object to that instruction at trial. *Ibid.*

3. On appeal, petitioner contended, *inter alia*, that the district court had erred in instructing the jury that it could find the requisite nexus to interstate commerce based on either the out-of-state ownership of the building or the building's receipt of natural gas that had been transported in interstate commerce. A divided panel of the court of appeals rejected that contention and affirmed petitioner's conviction. Pet. App. 26a-29a. The court subsequently granted rehearing en banc and vacated the panel opinion. *Id.* at 18a.

The en banc court of appeals rejected petitioner's challenge to the instruction on the interstate commerce requirement of the arson statute and affirmed the conviction. The court first concluded that because of petitioner's failure to object to the instruction at trial, the applicable standard of review was plain error. Pet. App. 3a. As part of its plain error analysis, the court considered whether a sufficient factual basis existed to warrant the application of the arson statute. After noting that the statute reaches arson of a building having even a de minimis connection to interstate commerce, the court held that "the totality of circumstances indicates that [the building in question] was embraced by the recognized meaning and intent of section 844(i) despite a cessation of its operation as the Fitness Center." *Id.* at 6a-7a.

In so holding, the court relied on several factors, including the commercial nature of the building; the fact that the building had been "verbally listed" with a real estate agent and was about to be placed on the market for sale; the short duration of the closure;

the building's continued receipt of utility services, including natural gas, following the closure; petitioner's continued presence on his father's payroll as manager of the Fitness Center through January 28, 1990; and the lease arrangement. Pet. App. 6a-7a. The court stressed that "[t]he market fully expected [the building] to become productive again," and that "[n]either the building itself nor its commercial nature had been abandoned." *Id.* at 7a.

The court of appeals then addressed the question whether "the jury instructions sufficiently defined the interstate commerce nexus required to fit the definition of the crime." Pet. App. 8a. Although the court did not decide whether either out-of-state ownership or receipt of interstate natural gas is in itself sufficient to satisfy Section 844(i)'s interstate commerce requirement, it concluded that the instruction did not amount to plain error. *Id.* at 10a-11a. The court explained that "[i]t is not so clear * * * that the instruction * * * was a plainly impermissible broadening of 844(i)'s scope." *Id.* at 10a.[1]

ARGUMENT

Petitioner contends (Pet. 6-7) that the requisite nexus to interstate commerce to support his arson conviction was not satisfied in this case. The decision of the court of appeals is correct, and petitioner identifies no conflict among the circuits on the question presented. In any event, petitioner's failure to object to the jury instructions at trial, and

[1] The dissenting judges took the view that the building's out-of-state ownership and receipt of interstate natural gas were insufficient to provide the requisite interstate nexus, and that the district court's contrary instruction amounted to plain error. Pet. App. 13a-17a.

the consequent applicability of the plain error standard, would make this case an unsuitable vehicle for examination of the reach of 18 U.S.C. 844(i) even if that issue warranted this Court's review.

1. a. Petitioner's primary argument is that the court of appeals erred insofar as it relied on the building's receipt of interstate gas for its finding that the requisite nexus to interstate commerce was satisfied. The court declined to decide whether such receipt is "alone sufficient" to satisfy the interstate commerce element, Pet. App. 10a, noting that petitioner had failed in any event to establish that the challenged instruction constituted plain error, *id.* at 11a.

The building's receipt of interstate natural gas was sufficient to establish the requisite nexus to interstate commerce. In *Russell* v. *United States*, 471 U.S. 858, 859 (1985), this Court held that "[t]he reference [in Section 844(i)] to 'any building . . . used . . . in any activity affecting interstate or foreign commerce' expresses an intent by Congress to exercise its full power under the Commerce Clause." Accordingly, the statute requires only a de minimis contact with interstate commerce. See, *e.g.*, *United States* v. *Shively*, 927 F.2d 804, 808 (5th Cir.), cert. denied, 501 U.S. 1209 (1991); *United States* v. *Stillwell*, 900 F.2d 1104, 1107-1110 (7th Cir.), cert. denied, 498 U.S. 838 (1990). The courts of appeals that have addressed the question since *Russell* have held that a building that receives interstate electricity or natural gas falls within the scope of Section 844(i). For example, in *United States* v. *Ramey*, 24 F.3d 602, 607 (4th Cir. 1994), petition for cert. pending,

No. 94-5755 (filed Aug. 15, 1994),[2] the Fourth Circuit applied the statute to a private residence that received electricity from an interstate power grid. The court explained that even though an individual residence may consume only a small amount of energy, "its consumption, combined with that of all similarly situated buildings, has a most definite effect on interstate commerce." *Ibid.* The aggregate effect, the court held, is sufficient to bring the entire class of residences within the reach of Congress's commerce power. *Ibid.*

In *United States* v. *Stillwell*, the Seventh Circuit reached the same conclusion. Relying on *Russell*, the court held that "Congress intended [Section 844(i)] to cover all properties it has the power to reach under the commerce clause." 900 F.2d at 1110. The court then concluded that Congress has power under the Commerce Clause to reach private residences that receive interstate natural gas. *Id.* at 1111. The court explained that "Congress could rationally believe that, in the aggregate, arson of private residences supplied with interstate natural gas has more than a *de minimis* effect on interstate commerce." *Ibid.*

Petitioner argues (Pet. 13) that because the building's "function" was not to receive natural gas, its receipt of that gas did not qualify as an "activity" within the meaning of Section 844(i). But the statute requires only that the building be used in "*any* activity" affecting interstate commerce; it does not require that the "activity" constitute the function of the building. However incidental to a building's

[2] The question is also presented by the petition for a writ of certiorari in *Moore* v. *United States*, No. 94-642 (filed Oct. 6, 1994).

function the receipt of natural gas might be, it qualifies as an "activity" in which the building is "used," as the courts in *Ramey* and *Stillwell* both held. This Court's modern Commerce Clause cases expressly reject attempts to identify which effects on commerce, while perceptible, are nonetheless "incidental," "indirect," or "remote." See, *e.g.*, *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 329 (1991); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 229-230 (1948).

b. As the court of appeals recognized, moreover, other factors showed that the building in this case was used in an activity affecting interstate commerce. Those factors include the building's commercial nature, its occupancy by a business until less than a month before the arson, and the fact that it had been "verbally listed" with a real estate agent and was about to be placed on the market for sale as a commercial property. Pet. App. 6a-7a.

In *Russell*, this Court observed that, in enacting Section 844(i), "Congress at least intended to protect all business property." 471 U.S. at 862. The fact that the building was temporarily in disuse is not significant, since "the [commercial] market fully expected it to become productive again." Pet. App. 7a. It is true that "there will be some point in time when a property that in the past has been used in an activity affecting interstate commerce, but which no longer operates in such activities, will lose its connection." *United States* v. *Medeiros*, 897 F.2d 13, 16 (1st Cir. 1990). As the Sixth Circuit observed in *United States* v. *Turner*, 995 F.2d 1357, 1362 (6th Cir.), cert. denied, 114 S. Ct. 282 (1993), however, "every circuit that has addressed the issue [has] conclude[d] * * * that property routinely used in

interstate commerce activity does not lose its interstate characteristics because of a temporary cessation of that activity."

It is also significant that the building "was about to be placed on the market for sale," and that, toward that end, it had been "verbally listed" with a real estate agent. Pet. App. 7a. In *Russell*, the Court held that "[t]he rental of real estate is unquestionably * * * an activity" that affects interstate commerce within the meaning of Section 844(i). 471 U.S. at 862. The sale of real estate is no less an "activity" that affects interstate commerce. Petitioner argues (Pet. 12) that the building's "marketability" was a "status" rather than an "activity" within the meaning of Section 844(i). The court of appeals did not invoke the building's mere marketability; it relied on the fact that petitioner and his father had actually taken steps to put the building up for sale. As discussed above, under *Russell* the sale of real estate qualifies as an "activity."

c. Petitioner argues (Pet. 12-13) that the court of appeals improperly considered the building's out-of-state ownership in concluding that the arson statute's commerce requirement was satisfied. He asserts that out-of-state ownership is irrelevant because it is a "*characteristic* of the property, not an 'activity' in which [the property] is 'used.'" Pet. 12. The building's out-of-state ownership, however, was not one of the factors on which the court of appeals relied in finding an effect on interstate commerce. See Pet. App. 7a.[3] In any event, at least where the

[3] The court's discussion of the building's out-of-state ownership occurred in the portion of its opinion addressing whether the jury instructions on interstate commerce

purpose of an investment in a building is to lease space and conduct business, ownership is an "activity"—a business or investment "activity." And here, as the court of appeals held, "[petitioner's] father manifested his ownership status through the exercise of direct, final control over the property in a necessarily interstate manner." *Id.* at 10a.

d. Petitioner further contends (Pet. 15-16) that the court of appeals' construction of Section 844(i) "tramples established notions of federalism." *Russell* makes clear, however, that Congress intended Section 844(i) to extend to the limit of its powers under the Commerce Clause. And petitioner does not dispute that Congress could constitutionally reach arsons like the one in this case.

e. Petitioner asserts (Pet. 7-8) that the court of appeals' decision conflicts with *United States* v. *Mennuti*, 639 F.2d 107 (2d Cir. 1981), and *United States* v. *Monholland*, 607 F.2d 1311 (10th Cir. 1979). The asserted conflict does not warrant the Court's review. In *Mennuti*, the defendants were charged under Section 844(i) with destroying two private residences with explosives. The Second Circuit held that Section 844(i) does not reach any private residence that was not used for commercial purposes. 639 F.2d at 111-112. The instant case, however, involves the arson of a commercial building, not a private residence, and therefore is distinguishable from *Mennuti*. Indeed, in a later arson case involving

---

constituted plain error. Pet. App. 10a. The petition does not appear to challenge the court's plain error analysis, but claims only that the Court should review the "logically prior holding that the fitness center fit within the ambit of Section 844(i)." Pet. 7.

commercial buildings, the Second Circuit relied in part on the fact that the buildings were heated by interstate fuel to find that Section 844(i)'s interstate commerce requirement was satisfied. *United States* v. *Barton*, 647 F.2d 224, 232 (2d Cir.), cert. denied, 454 U.S. 857 (1981). In any event, *Mennuti* predates the Court's decision in *Russell*, which made clear that Section 844(i) applies to private residences so long as those residences are within the reach of Congress's power to regulate interstate commerce. 471 U.S. at 862. As the court of appeals in *Ramey* explained, "*Russell*'s holding that the full commerce power is exercised in § 844(i) saps *Mennuti* of any vigor." 24 F.3d at 607. See also *Stillwell*, 900 F.2d at 1109 ("We believe the Supreme Court squarely rejected the rationale of *Mennuti* in *Russell*.").

Monholland also predates *Russell* and is in any event distinguishable from the instant case. In *Monholland*, the defendant was convicted under Section 844(i) of conspiring to assassinate a judge by blowing up his pickup truck. The court of appeals reversed the conviction, concluding that the truck, which the judge used to commute to and from work, was "wholly immaterial as far as any commerce is concerned even if we assume that there is a commerce quality about what the judge does after he gets to work." 607 F.2d at 1316. The *Monholland* court did not have before it any of the factors on which the court of appeals here relied in concluding that Section 844(i)'s interstate commerce requirement was satisfied. The court did, however, draw a distinction for purposes of the arson statute between a vehicle and a commercial building, stating that "a building lends itself to [a finding of the requisite

effect on interstate commerce] more readily than does a vehicle." *Ibid.*

2. As we explain above, see pages 6-8, 9-10, *supra*, the district court correctly instructed the jury that it could rely on the building's receipt of interstate natural gas or its out-of-state ownership in finding that Section 844(i)'s interstate commerce element was satisfied. In any event, petitioner could not obtain relief unless he could show that the instruction constituted plain error. To qualify as "plain," an error must, among other things, be "'clear' or, equivalently, 'obvious.'" *United States* v. *Olano*, 113 S. Ct. 1770, 1777 (1993), quoting *United States* v. *Young*, 470 U.S. 1, 17 n.14 (1985). Any error in the instruction at issue was far from "obvious" in light of *Russell* and *Stillwell* (which was decided before petitioner's trial), not to mention a host of other appellate decisions applying Section 844(i)'s interstate commerce requirement broadly. Petitioner has cited no post-*Russell* case supporting his position, and the pre-*Russell* cases he invokes are inapposite. Given the prevailing case law, the court of appeals correctly held that the district court's interstate commerce instruction did not amount to an "obvious" error. And even if it were such an error, petitioner could not meet his burden to show that the error resulted in a miscarriage of justice or that it seriously affected the "fairness, integrity or public reputation of judicial proceedings." *Olano*, 113 S. Ct. at 1779.

3. The Court need not hold this case pending its decision in *United States* v. *Robertson*, No. 94-251 (argued Feb. 27, 1995). The issue in *Robertson* is whether the interstate movement of goods and people in connection with the operation of a gold mine is

sufficient to justify the conclusion that the activities of the mine affect interstate commerce within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(a). Respondent in *Robertson* appears to contend that the phrase "affecting commerce" in the RICO statute does not invoke Congress's full power under the Commerce Clause. In this case, by contrast, petitioner's claim turns on the phrase "used * * * in any activity" in the federal arson statute, not on the phrase "affecting commerce." Moreover, the Court has already held in *Russell* that Congress intended in the arson statute to exercise its full power under the Commerce Clause. Finally, *Robertson* raises no issue concerning the application of the plain error standard. Accordingly, *Robertson* is unlikely to affect the disposition of this case.[4]

---

[4] Nor does *United States* v. *Lopez*, No. 93-1260 (argued Nov. 5, 1994), have any bearing on the issue presented by this case. The issue in *Lopez* is whether the Commerce Clause empowered Congress to enact 18 U.S.C. 922(q) (Supp. V 1993), which makes it a federal offense to possess a firearm within 1,000 feet of a school. Petitioner raises no issue concerning Congress's power to enact the arson statute. He merely contends that the evidence adduced by the government is insufficient to satisfy the statute's interstate commerce requirement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

MARCH 1995